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## Workmen's Compensation: Toward a Stricter Liability for Enterprise

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## WORKMEN'S COMPENSATION: TOWARD A STRICTER LIABILITY FOR ENTERPRISE

The industrialization which occurred during the nineteenth century provided a major stimulus for the adoption of the negligence theory of tort liability.<sup>1</sup> Once this process of industrialization was complete, a system of enterprise liability apart from the general law of torts began to develop.<sup>2</sup> This emergent system, anchored to the basic principles of deterrence and risk-spreading,<sup>3</sup> diverged from the concept of negligence most notably in two fields closely tied to the manufacturing process—workmen's compensation and products liability.<sup>4</sup> As a result of their reliance on the theory of liability without fault, these two branches of the law have provided relief for the injured party in an efficient manner.<sup>5</sup> Problems can arise, however, when these two theories are invoked concurrently, and recovery is sought against both the employer who is traditionally liable according to negligence theory and the

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<sup>1</sup> W. PROSSER, *THE LAW OF TORTS* § 28, at 140 (4th ed. 1971) [hereinafter cited as PROSSER]; Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Winfield, *The History of Negligence in the Law of Torts*, 42 L. Q. REV. 184, 195 (1926).

<sup>2</sup> As Professor Green describes the change:

Liability of the enterpriser for negligence has been broadened immeasurably and his immunities have either been removed altogether or have at least suffered severe modifications. The reaction presents a jagged front, neither extension of liability or modification of defense is the same in any two areas of litigation, and certainly not in different jurisdictions.

Green, *Should the Manufacturer of General Products be Liable Without Negligence?*, 24 TENN. L. REV. 928, 931 (1957).

<sup>3</sup> See F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 11.4(3), 12.4(3), 13.2 (1956), for a discussion of deterrence and distribution of risk; Witte, *The Theory of Workmen's Compensation*, 20 AM. LAB. LEG. REV. 411 (1930). For a general discussion of the deterrent results of liability insurance, see James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 559 (1948).

<sup>4</sup> The interplay between the developments in the areas of workmen's compensation and products liability is summarized by Justice Roger J. Traynor in *Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 375 (1965):

The development of strict liability for defective products, for industrial injuries covered by workmen's compensation and for injuries caused by ultra-hazardous activities, presages the abandonment of long-standing concepts of fault in accident cases. The significant innovations in products liability may well be carried over to such cases.

See also Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189, 205-06 (1965).

<sup>5</sup> McCoid, *The Third Person in the Compensation Picture—A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 389, 401 (1959).

manufacturer who is liable to the injured employee on a claim of products liability.<sup>6</sup>

This article considers the situation in which an employee injured by a defective product in the course of his employment can proceed both against his employer insured by a workmen's compensation program and against a manufacturer of the employer's equipment who is strictly liable under a claim of products liability. The focus is not on the manufacturer as employer but on the manufacturer as supplier of defective equipment which causes injury. This is the best situation for analyzing the problems arising from the present system for distributing losses because, where the negligence of the employer has been an independent cause of the workman's injury, the equities pertaining to the apportionment of damages are evenly balanced.<sup>7</sup> Traditional tort theory would denominate the employer and manufacturer joint tortfeasors.<sup>8</sup> Both are in a position to spread the cost of any recovery to those with whom they deal. Moreover, no element of sympathy enhances the position of either the employer or the manufacturer.<sup>9</sup> A study of this situation points to grave inequities,<sup>10</sup> judicial dissatisfaction,<sup>11</sup> and a need for legislative reevaluation of the structure of the current enterprise liability system.<sup>12</sup>

<sup>6</sup> A. EHRENZWEIG, *TRENDS TOWARD AN ENTERPRISE LIABILITY FOR INSURABLE LOSS: NEGLIGENCE WITHOUT FAULT* § 16, at 55 (1951) [hereinafter cited as EHRENZWEIG].

<sup>7</sup> Professor Larson calls the general question of apportionment of loss between a third party and negligent employer "[p]erhaps the most evenly-balanced controversy in all of compensation law." 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 76.10, at 227 (1970) [hereinafter cited as LARSON].

<sup>8</sup> The definition of joint tortfeasors has been expanded for use in this situation:

At one time [the term joint tortfeasors] was applied only to persons who acted in unison or concert to inflict injury or damage, but today it is generally considered to be applicable "in all cases where there is joint liability for a tort, whether the acts of those jointly liable were concerted, merely concurrent or even successive in point of time."

Note, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts*, 42 VA. L. REV. 959-60 (1956), quoting Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131 n.9 (1932). For the definition of joint tortfeasors as set forth in the UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT, see note 89 *infra*.

<sup>9</sup> [T]here is no 'injured' person to protect, since the employer's contribution to the compensation coverage or direct payment of compensation for his employees is recognized as one of the normal expenses of his enterprise. On the other hand, the third person . . . has engaged in conduct which is unreasonable and can scarcely be treated as an innocent injured party.

McCoid, *supra* note 5, at 451.

<sup>10</sup> See notes 54-65 and accompanying text *infra*.

<sup>11</sup> See notes 66-98 and accompanying text *infra*.

<sup>12</sup> See notes 100-22 and accompanying text *infra*.

## I. WORKMEN'S COMPENSATION THEORY

At the beginning of this century it became apparent that the traditional bases of tort liability, particularly the concept of negligence, often led to inadequate protection of workmen in the course of their employment. Some of the industrial accidents which occurred could not be traced to any fault on the part of the employer.<sup>13</sup> Moreover, even when fault could be found, "the three wicked sisters of the common law"—contributory negligence, assumption of risk, and the fellow-servant rule—often precluded recovery.<sup>14</sup> The laws enacting programs for workmen's compensation were a reaction to this inability of the employee to obtain judicial relief.<sup>15</sup> By providing a guaranteed recovery to the injured worker,<sup>16</sup> these programs rejected the belief that a worker's wages were adequate compensation for the risks he encountered.<sup>17</sup>

In so providing for a recovery, workmen's compensation programs maintained a number of the social functions that had been performed by a tort law based on negligence. Legislatures, hypothesizing that the cost of industrial accidents, whether avoidable or not, was a cost of doing business,<sup>18</sup> placed the financial

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<sup>13</sup> Liability for negligence without fault, the basic liability in the scheme of social insurance

may be said to include injuries which, being typical for the particular enterprise, could have reasonably been foreseen (though not avoided without abandoning the enterprise) by the entrepreneur when starting his activity.

EHRENZWEIG, *supra* note 6, § 16, at 61.

<sup>14</sup> PROSSER, *supra* note 1, § 80, at 531. See also S. HOROWITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 1-4 (1944); *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 288-92, 94 N.E. 431, 437-39 (1912), in which the Court of Appeals, in the course of holding the first New York workmen's compensation act unconstitutional, acknowledged the ability of the legislature to restrict the operation of these doctrines.

<sup>15</sup> Professor Gregory has said that the workmen's compensation acts do not apply only to situations involving extrahazardous conduct, but rather

undertake merely to place on industry the losses sustained by workers on their jobs as a consequence of the ordinary risks of their employment, without regard to fault or negligence.

Gregory, *supra* note 1, at 385. See also Note, *Workmen's Compensation Acts: Their Theory and Their Constitutionality*, 25 HARV. L. REV. 129, 130-34 (1911).

<sup>16</sup> The imposition of absolute liability upon the employer is tempered by the limitations upon the extent of his liability under the acts:

[W]orkmen's compensation laws effectively strike a balance between quick and certain recovery for the employee, in return for which the employer's liability is limited by statute. In this manner, the socially desirable policy of compensating industrial injuries can be carried out with the industries themselves bearing the burden, or transferring the cost to society in general.

Comment, *Workmen's Compensation: The Impact of the Witt v. Jackson Rule on the Law of Third Party Settlements*, 17 U.C.L.A.L. REV. 651, 653 (1970).

<sup>17</sup> Note, *supra* note 15, at 130.

<sup>18</sup> The court in *Union Iron Works v. Industrial Accident Comm'n*, 190 Cal. 33, 39, 210 P. 410, 413 (1922), awarding an injured employee the cost of an operation that his employer's doctors felt unnecessary, said that

burden of the program on those consumers who had benefited by the work of the injured party.<sup>19</sup> Slight price increases would then cover this cost of business. Furthermore, the workmen's compensation system imposed absolute liability on the employer, thus creating a certain deterrent effect. Presumably the industries themselves would improve the working environment of their employees in order to minimize losses under the new statutes.<sup>20</sup>

The absolute liability to which the enterprise was subject was not fashioned upon common-law analogies. As Professor Freund states,

[T]he essence of the new law was that it did not attempt to redress acts or omissions, but to relieve a situation, not, . . . upon an arbitrary basis, but upon a new principle which perhaps should be designated as that of social solidarity.<sup>21</sup>

The upper limit of the employer's liability was fixed by law, usually as a proportion of the worker's wages, and was dependent upon the severity of the disability.<sup>22</sup> This recovery was not to compensate for the damages suffered by the workman but rather was intended to redress only his lost earning ability.<sup>23</sup> Thus full tort recovery was sacrificed on the assumption that the injured party would not become a burden to society.<sup>24</sup> This limited measure of recovery struck a balance between the present need for a certain recovery and the intended result of the common-law tort

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The underlying principle upon which the Workmen's Compensation Act rests . . . emanates from the economic thought that personal injury losses incident to an industry is a part of the costs of production, to be borne, just as the depreciation and replacement of a machine is borne, by the industry itself, which compensation will be included in the cost of the product of the industry.

<sup>19</sup> The most colorful statement of this belief is that credited to Lloyd George: "The cost of the product should bear the blood of the workman." PROSSER, *supra* note 1, § 80, at 530. This phrase is also echoed by Justice Traynor in his opinion in *Witt v. Jackson*, 57 Cal. 2d 57, 71, 17 Cal. Rptr. 369, 377, 366 P.2d 641, 649 (1961), in which California adopted a minority position, denying the employer the means by which he could escape the cost of the employee's workmen's compensation award. See text accompanying notes 86-88 *infra*.

<sup>20</sup> 2 F. HARPER & F. JAMES, *supra* note 3, at §§ 11.4(3), 12.4(3); James, *supra* note 3, at 559; James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 779-82 (1951); McCoid, *supra* note 5, at 398-400.

<sup>21</sup> E. FREUND, *STANDARDS OF AMERICAN LEGISLATION* 110 (1931). See also Larson, *The Welfare State and Workmen's Compensation*, 5 NACCA L.J. 18-24 (1950).

<sup>22</sup> Millender, *Expanding Employee's Remedies and Third Party Actions*, 17 CLEV.-MAR. L. REV. 32, 32-33 (1968); *Union Iron Works v. Industrial Accident Commission*, 190 Cal. 33, 39, 210 P. 410, 413 (1922).

<sup>23</sup> See Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 57, 81-84.

<sup>24</sup> 1 LARSON, *supra* note 7, § 2.40, at 10.

remedy, *i.e.*, making the injured party whole by compensating him for pain and suffering as well as lost earning potential.<sup>25</sup>

To counterbalance the imposition on the employer of absolute liability, any award under the workmen's compensation system works to destroy any other causes of action against the employer arising out of the same injury, regardless of whether the employer was at fault.<sup>26</sup> Professor Larson describes this protection afforded the employer as having two bases.<sup>27</sup> First, workmen's compensation statutes themselves typically impose a specific bar to suits on the basis of the injury not only by the employee and his dependents, but by "any other person" as well.<sup>28</sup> Additionally, Larson cites a second, more theoretical, basis that since the employer has undertaken liability for *all* injuries, the duty of the employer to exercise due care towards his employee becomes legally irrelevant. Once the employer is relieved of this duty, it follows that he cannot violate it, and that a basis for common-law tort liability no longer exists.<sup>29</sup>

This bar to subsequent actions does not protect any third party, such as a manufacturer whose defective product may have contributed to the workman's injury.<sup>30</sup> Since the third party did not

<sup>25</sup> While reparation has never been made for pain and suffering under workmen's compensation programs, other forms of noneconomic damages have been allowed:

Thus there are compromises of the compensation principle in the form of benefits awarded in some states for disfigurement, schedule benefits for certain disabilities without proof of wage loss, extra payments for workers injured through their employers' violation of safety regulations and for minors injured while unlawfully employed, and special benefits for rehabilitation.

Brodie, *supra* note 23, at 81.

<sup>26</sup> See, e.g., Federal Employee's Compensation Act, 5 U.S.C. § 8116(c) (1970); ILL. REV. STAT. ch. 48, § 138.5(a) (1971); MICH. COMP. LAWS ANN. § 411.4 (1967); MINN. STAT. ANN. § 176.031 (1966).

<sup>27</sup> 2 LARSON, *supra* note 7, § 76.22, at 245.

<sup>28</sup> For example, note the language of the Federal Employee's Compensation Act, 5 U.S.C. § 8116(c) (1970):

The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and *any other person* otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death . . . (emphasis added)

See, *Busey v. Washington*, 225 F. Supp. 416, 424 (D.D.C. 1964), in which the court refused to require contribution from the United States in a suit involving an injured post office worker, stating that "the exclusive liability provision of the Compensation Act constitutes a legal bar to the recovery of contribution from the United States by the third-party plaintiff herein." See also 2 LARSON, *supra* note 7, § 76.22, at 245.

<sup>29</sup> *Id.*

<sup>30</sup> Professor McCoid states that

The preponderant view is to deny [contribution] to the third person against the immediate employer on the ground that there is no common or joint liability since the employer's obligation to provide compensation arises pure-

pay any part of the workmen's compensation premiums, his liability is not limited by the statute. The injured workman may therefore seek to recover from the third party damages in excess of his lost earning capacity.<sup>31</sup> Here also the protection afforded to the employer by the dual foreclosure cited by Larson is significant. Since the express provisions of most statutes preclude any attempt by a third-party tortfeasor to join the employer for contribution or indemnity, the employer is afforded strong protection against involvement in the third-party tort suit.<sup>32</sup> Even in the absence of a statutory bar, courts have held that because the initial liability of the employer was absolute and not derived from common-law negligence, the employer cannot be a joint tortfeasor.<sup>33</sup> Thus, under common-law doctrine the manufacturer cannot recover from the employer in the absence of some independent obligation.<sup>34</sup> Such an obligation might occur when the employer has released the manufacturer from any liability resulting from misuse of the machinery, a situation that virtually never occurs.<sup>35</sup>

Furthermore, the workmen's compensation laws of all but two

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ly from his status and attaches without proof of fault and without reference to common law damage principles while the third person's liability is dependent upon some "fault" and had no prescribed bounds.

McCoid, *supra* note 5, at 437.

<sup>31</sup> The first workmen's compensation statutes excluded suits by the injured worker against third parties. WASH. LAWS ch. 74, § 1 (1911); MONT. LAWS, ch. 96, § 3(d) (1915). Today all American compensation systems recognize the retention of the common law rights of the employee against parties whose liability is not determined by the statute. McCoid, *supra* note 5, at 395.

<sup>32</sup> See *Yale & Towne Mfg. Co. v. J. Ray McDermott Co.*, 347 F.2d 371 (5th Cir. 1965), a suit by an employee injured while using a defective hoist, in which the court refused to allow a claim by the manufacturer against the employer on an allegation that the employer had failed to provide a safe place to work. In *Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co.*, 77 Ohio App. 316, 62 N.E.2d 180, *appeal dismissed*, 145 Ohio St. 615, 62 N.E.2d 251 (1945), the court held that an employer who had paid the workmen's compensation award was not liable for contribution in that amount to the third party whose negligence had resulted in the explosion of a tank of oxygen.

<sup>33</sup> See cases discussed in note 32 *supra*. For a different result, predicated upon the UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT, see *Maio v. Fahs*, 339 Pa. 180, 14 A.2d 105 (1940), in which the court held that the employee's recovery against the third party was limited to the amount of the judgment less the amount of the workmen's compensation award. See generally text accompanying note 103 *infra*.

<sup>34</sup> 2 LARSON, *supra* note 7, § 76, at 227, and § 76.44, at 250.78. In *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 56 (Del. Super. 1970), the University was allowed to bring an action for indemnity against the employer phone company on the basis of an implied contract to do the work on its property in a careful and prudent manner. In *Dale v. Whiteman*, 36 Mich. App. 533, 193 N.W.2d 911 (1971), a similar result was reached when the court found that the owner of a carwash owed an independent duty to the owner of a vehicle to operate the vehicle through the carwash in a careful manner.

<sup>35</sup> As Larson points out, to expect to find such a reverse warranty in ordinary commercial dealings would "be stretching the concept of contract out of all relation to reality." 2 LARSON, *supra* note 7, § 76.44, at 250.84. See also *McClish v. Niagara Machine & Tool Works*, 266 F. Supp. 987, 991 (D. Ind. 1967), in which the court rejected the manufacturer's theory that the employer's representation that the machine would be operated pursuant to certain safety standards created a duty to indemnify the manufacturer.

states<sup>36</sup> subrogate the employer to the claim of his employee against a third party, regardless of whether the employer shares any blame for the injury.<sup>37</sup> The effect of this statutory subrogation is to associate the interests of the employer with those of his employee. The employer will proceed against the manufacturer on a claim of strict liability. Even though the employer may be equally at fault for the injury, he may recover the cost of the workmen's compensation award paid to the injured worker, thus passing the entire cost onto the manufacturer.<sup>38</sup>

## II. PRODUCTS LIABILITY THEORY

A similar development in personal injury cases has increased the liability of manufacturers. During the nineteenth century, the general theory of negligence and the doctrine of privity worked to deny recovery against manufacturers for injuries resulting from the use of their products and services. These judicial results furthered the social policy of limiting the liability of the enterprise.<sup>39</sup> Once industrialization became firmly established, how-

<sup>36</sup> OHIO REV. CODE ANN. §§ 4123.01-.99 (1965), *as amended*, (Supp. 1971); W. VA. CODE ANN. §§ 23-1-1 *et seq.* (1970). New Hampshire formerly adhered to the prohibition against subrogation until a new workmen's compensation law was enacted in 1947. N. H. REV. STAT. ANN. §§ 281:1 *et seq.* (1966), *as amended*, (Supp. 1971).

<sup>37</sup> The theories enabling the employer to bring suit on the employee's rights vary from state to state. In *Lovette v. Lloyd*, 236 N.C. 663, 668, 73 S.E.2d 886, 891 (1953) the court said:

The employer or the insurance carrier, who has paid or become obligated to pay compensation to the employee injured by the negligent third party, has the exclusive right in the first instance to commence an action "in his own name and/or in the name of the injured employee . . . ."

In *Marciniak v. Pennsylvania R.R.*, 152 F. Supp. 89, 91 (D. Del. 1957), the court found the subrogation provision of the workmen's compensation act to constitute a "grant to an employer or insurer of the employee's right to proceed against a negligent third party." The New Mexico Supreme Court noted in *Royal Indem. Co. v. Southern Calif. Petroleum Corp.*, 67 N.M. 137, 144, 353 P.2d 358, 363 (1960), regarding N.M. STAT. ANN. § 59-10-25 (1953), that "there is but one cause of action, and the employer, or his insurer, is specifically granted reimbursement in this single cause of action." For a discussion of the actual mechanics of the subrogation procedure, see Note, *Problems of Election Under Workmen's Compensation Acts*, 48 GEO. L. J. 761 (1960).

<sup>38</sup> *Marciniak v. Pennsylvania R.R.*, 152 F. Supp. 89 (D. Del. 1957); *Williams Bros. Lumber Co. v. Meisel*, 85 Ga. App. 72, 68 S.E.2d 384 (1951). In *Indemnity Ins. Co. v. Odom*, 237 S.C. 167, 176-77, 116 S.E.2d 22, 27 (1960), the court reversed a holding that the contributory negligence of the employer barred a recovery of the workmen's compensation award from the third-party recovery of the employee's widow, on the grounds that the assignment of the cause of action was granted by statute rather than by the principles of equitable restitution.

<sup>39</sup> See generally Gregory, *supra* note 1. Although these protections may have been felt necessary, a number of exceptions such as trespass, ultrahazardous activity, breach of warranty, *res ipsa loquitur*, the "reasonable man" test, and respondeat superior soon evolved to provide a measure of relief to the victims of enterprise. EHRENZWEIG, *supra* note 6, § 2, at 10-11.



ever, enterprises no longer needed to be favored with relaxed rules of liability.<sup>40</sup> The apparent wealth of the corporate entities and their ability to distribute the cost of industrial injuries stimulated a movement demanding a greater degree of responsibility for injuries that resulted from their operations.<sup>41</sup> Gaining acceptance in the last fifty years, this trend toward strict liability for the manufacturer has been all but universally acknowledged as a legitimate form of enterprise liability.<sup>42</sup>

In holding a manufacturer liable to an injured worker, the theory of strict liability in tort eliminates the necessity of proving that the defect in the product which caused the injury was the result of negligence.<sup>43</sup> The theory rests upon two social policies: the desire to eliminate unnecessarily complicated suits by limiting the role of the privity concept,<sup>44</sup> and a belief that

The public interest in human life, health, and safety demands the maximum possible protection that the law can give against dangerous defects in products . . . [and] justifies the imposition upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.<sup>45</sup>

The injured party, therefore, need only show that his injury was caused by the defect, that the defect was "unreasonably dan-

<sup>40</sup> Gregory, *supra* note 1, at 396.

<sup>41</sup> EHRENZWEIG, *supra* note 6, § 16, at 55.

<sup>42</sup> Professor Green, *supra* note 2, at 937, states:

Whatever the doctrine, strict or less strict, it has its source in the maximum protection that can be given through the courts to "we the people," and at the same time not burden enterprise beyond its capacity to function. And in affording this protection there has been steady progress throughout the last half-century in providing safer products and in shifting the risks of enterprise through insurance and price controls back to the consumers. In this way . . . no one is excessively burdened.

See also Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

<sup>43</sup> Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960).

<sup>44</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). The court's holding that a manufacturer has liability to the consumer if the nature of the product is such that it is "reasonably certain to place life and limb in peril when negligently made" provided the exception to the doctrine of privity that eventually "swallow[ed] the asserted general rule of nonliability, leaving nothing upon which that rule could operate." *Carter v. Yardley & Co.*, 319 Mass. 92, 103, 64 N.E.2d 693, 700 (1946). See also Peairs, *The God in the Machine*, 29 BOST. U.L. REV. 37 (1949).

<sup>45</sup> Prosser, *supra* note 43, at 1122. See also *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944), in which Justice Traynor stated in concurrence that the risk of the occurrence of injuries from the marketing of 'defective products is "a constant risk and a general one. Against such a risk there should be a general and constant protection and the manufacturer is best situated to afford such protection."

gerous," and that the defect existed in the product at the time it left the control of the manufacturer.<sup>46</sup>

The party suing under a claim of strict products liability may also benefit from the elimination of the manufacturer's defense of contributory negligence in those cases where the plaintiff has merely failed to discover the defect in the product or to guard against its existence.<sup>47</sup> This inability of the manufacturer to pass part of the liability onto a party who shares responsibility for the cause of an accident has been extended to third-party situations. In *Fenton v. McCrory*,<sup>48</sup> where the manufacturer of a defective product sought to join a third party who had used the product in a negligent manner, thereby helping to cause the plaintiff's injury, the court held that no right to contribution exists "between those whose liability is imposed under different grounds."<sup>49</sup> The decision was based in part on the history of the rule of contribution between tortfeasors in Pennsylvania, but a significant factor was the court's belief that the burden of payment should be imposed on the manufacturer regardless of the amount of due care exercised.<sup>50</sup> Thus, by choosing to place the cost of injuries upon the enterprise, which is better able to spread the costs throughout society, and by refusing to allocate the costs according to degrees of responsibility, the courts have shown a willingness to undercut common-law ties in the interest of preserving the strictness of enterprise liability.

Like workmen's compensation, the imposition of strict liability is based upon both practical considerations and public policy. These policy considerations include the deterrent effect of a heightened level of responsibility placed on the manufacturer<sup>51</sup> and the ability of the manufacturer to distribute to those who

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<sup>46</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965); Prosser, *supra* note 43, at 1114. Oddly enough, the part of the plaintiff's burden that has been eliminated, *i.e.*, proof of negligent manufacturing, is that part that is generally the easiest to prove. *Id.*

<sup>47</sup> PROSSER, *supra* note 1, at 670. If the negligence involves using the defendant's product in spite of a known danger, this defense will be applied, however, to relieve the manufacturer of his liability. This form of contributory negligence, Prosser says, "overlaps assumption of risk." *Id.* at 671. See also RESTATEMENT (SECOND) OF TORTS § 402A, comment (n) (1965).

<sup>48</sup> 47 F.R.D. 260 (W.D. Pa. 1969).

<sup>49</sup> *Id.* at 262.

<sup>50</sup> *Id.*

<sup>51</sup> Professor James notes that

[T]he manufacturer is in a peculiarly strategic position to improve the safety of his products, so that the pressure of strict liability could scarcely be exerted at a better point if accident prevention is to be furthered by tort law.

James, *General Products—Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); See also James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 547 (1952).

benefit from the products the cost of injuries resulting from defects.<sup>52</sup> Although the validity of the practical considerations is by no means free from doubt,<sup>53</sup> it is generally thought that considerations of policy support this form of enterprise liability.

### III. APPORTIONMENT OF THE RECOVERIES

#### A. Theoretical Interaction

There is great similarity apparent between the strict liability imposed on the manufacturer of defective products and the liability borne by the employer under the workmen's compensation statutes. The basic difference for present purposes lies in the fact that strict liability, while eliminating the burden of proving negligence, leaves the manufacturer under the auspices of tort law,<sup>54</sup> while the employer's liability is created by statute and is independent of the common law.<sup>55</sup>

While both theories manifest the highly laudable aim of efficiently providing the injured party with compensation, there has been no attempt to reconcile the two theories in situations where they both allow for recovery. A leading authority on workmen's compensation has noted:

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<sup>52</sup> Professor James likens this to a process of "natural selection" whereby "matters of indemnity and liability-over among potential defendants will be worked out in the way dictated by the economic and bargaining positions of the various parties." James, *General Products*, *supra* note 51, at 925. See also Jeanblanc, *Manufacturers' Liability to Persons Other than Immediate Vendees*, 24 VA. L. REV. 134, 158 (1937).

<sup>53</sup> See Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 945-46 (1957); Prosser, *supra* note 43, at 1119-22.

<sup>54</sup> See note 46 and accompanying text *supra*.

<sup>55</sup> See note 21 and accompanying text *supra*. To say that strict liability can be differentiated from workmen's compensation because it is not statutory refers only to the origins of the theory. In fact, certain codifications of the rule as it has evolved in the courts have been quite influential. See *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), where the Supreme Court of Pennsylvania adopted § 402A of the RESTATEMENT (SECOND) OF TORTS as "the law of Pennsylvania." Section 402A, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," states that

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

a) the seller is engaged in the business of selling such a product, and  
b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

a) the seller has exercised all possible care in the preparation and sale of his product, and  
b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[T]he distortions of our old-fashioned fault concepts that have been thought advisable for reasons of social policy are exclusively limited to providing an assured recovery for the injured person; they have never gone on—once the injured person was made whole—to change the rules on how the ultimate burden was borne.<sup>56</sup>

The resulting incongruities may be best illustrated in the situation in which both the employer and the manufacturer, although not having engaged in morally reprehensible conduct, are equally responsible for the cause of the injury.<sup>57</sup> Arguably, in this case each is equally capable of spreading the cost of the recovery to the consuming public as a part of the general cost of doing business.

In spite of the balanced equities, and although both parties are liable under the principles of enterprise liability which have superseded common-law negligence, the majority of courts has reached a result typical of the common law: total victory for one of the parties.<sup>58</sup> The employer is allowed to recover the cost of his workmen's compensation payments from the manufacturer by subrogation to the rights of the employee. Although both the manufacturer and the employer are independent causes of the workman's injury, any attempt by the manufacturer to join the employer as a joint tortfeasor is foreclosed by the terms of the workmen's compensation statutes which bar suits by "any other person," including suits for contribution.<sup>59</sup>

Any attempt to harmonize this harsh result with the principle requiring that the burden of compensation be apportioned among those at fault is futile.<sup>60</sup> Indeed, if liability could be predicated upon a failure to warn the injured employee of a defect, the

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<sup>56</sup> 2 LARSON, *supra* note 7, § 71.10, at 165.

<sup>57</sup> This is the difference between what Ehrenzweig categorizes as "moral negligence" and "negligence without fault"—"the difference between the censure of reprehensible conduct, on the one hand, and a liability for the unavoidable and insurable consequences of lawful [enterprise] activities on the other hand." EHRENZWEIG, *supra* note 6, § 16, at 61.

<sup>58</sup> As Professor Larson states:

The disadvantage of most dispositions of this total problem is one that is characteristic of the common-law system: the inability to share a loss adjustment because of the legal imperative of granting total victory to plaintiff or defendant. Thus, the usual rule that contribution by the negligent employer is impossible . . . is too absolute a victory for the employer, who actually comes out ahead by being reimbursed for his compensation outlay.

2 LARSON, *supra* note 7, § 76.22, at 250.9.

<sup>59</sup> *Id.* § 76, at 227. See also notes 27–29 and accompanying text *supra*.

<sup>60</sup> Professor Larson is of the opinion that every well-conceived loss-adjusting mechanism has two main aims in that "it must make the injured person whole, and it must also seek out the true wrongdoer whenever possible." *Id.* § 71.10, at 165. See also EHRENZWEIG, *supra* note 6, § 2, at 9.

employer would be seen as the more culpable of the two parties, since the defective product was in use under his supervision.<sup>61</sup> Instead, he may avoid any financial loss by means of subrogation.<sup>62</sup>

This result also frustrates the fulfillment of policies behind enterprise liability. The employer in this situation has passed the costs of injuries arising out of his business entirely onto the manufacturer through the means of subrogation and the bar to suits for contribution. Thus, under some circumstances, the cost-spreading ability of the system may be diminished by the restriction of costs to one level of industry. Furthermore, there is no corresponding savings in the administration of this supposedly efficient system because in the majority of cases in which such a situation would arise, both parties are already in court. The manufacturer would be the defendant in the products liability suit brought by the employee, and the employer would be active as the subrogee of his workman.<sup>63</sup> Additionally, the deterrent force ceases to be wholly significant in the location where that force can be most effective—at the place of employment.<sup>64</sup> In jurisdictions permitting the employer to recover in excess of the costs for which he is statutorily liable as an incentive to subrogate and sue on behalf of the injured workman,<sup>65</sup> the deterrent force of the workmen's compensation acts is negligible.

### *B. Judicial Attempts to Apportion Recoveries*

The arbitrary results produced by the interaction between the tort liability of a third party and the statutory liability of an

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<sup>61</sup> The importance of the user's ability to detect defects in the product with which he works has had an important impact outside of that area where the bar of workmen's compensation applies. It is here where a seemingly lesser standard of strict liability has been applied (see Green, *supra* note 2, at 932-33) and where strict liability may be countered by the defense of contributory negligence (see Prosser, *supra* note 43, at 1148).

<sup>62</sup> See note 58 *supra*.

<sup>63</sup> The actual mechanics of the subrogation procedure vary according to the provisions of the state workmen's compensation acts. For a discussion of the types of statutes, see Note, *Problems of Election Under Workmen's Compensation Acts*, 48 GEO. L.J. 761 (1960).

<sup>64</sup> As Green points out, the manufacturer

may give the most explicit directions and warnings but those who service or use the machine may disregard the directions or tinker with the mechanism or put it under a strain it was not designed to meet or otherwise subject it to abuse. There is no such thing as a mechanical product safe for very long in the hands of someone who does not know how to use it or who attempts to use it for a purpose for which it was not designed.

Green, *supra* note 2, at 933.

<sup>65</sup> The workmen's compensation statute in New York provides that when the employer's insurance carrier recovers a judgment from the third party in excess of the cost of the

employer have not gone unnoticed by the courts. While a majority of jurisdictions acknowledges the existence of a statutory right of subrogation by the employer,<sup>66</sup> some courts have demonstrated "an aversion to recognizing third-party liability to the employer except where expressly recognized."<sup>67</sup> Recovery thus has been denied where the statute of limitations terminated the right to sue in tort before the right of subrogation arose in the employer,<sup>68</sup> as well as where the cause of action for the wrongful death of the employee expired with the death of the employee's widow before the employer could bring suit.<sup>69</sup>

The decision of the United States Supreme Court in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*<sup>70</sup> is contrary to these cases to the extent that it holds that the statutory provision of the right of subrogation is an aid to the employer rather than a limitation upon his rights.<sup>71</sup> *Burnside* did not involve a products liability claim but instead arose out of the death of a stevedore and the payment of compensation to the workman's estate under the Longshoremen's and Harbor Workers' Compensation Act.<sup>72</sup> The widow filed a wrongful death claim against the shipowner who sought indemnification from the employer on the basis of an

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workmen's compensation award, the carrier is entitled to keep one-third of the excess. N.Y. WORKMEN'S COMP. § 29(2) (McKinney 1965). See also Atleson, *Third Party Actions and the Apportionment of Attorney's Fees*, 19 BUFFALO L. REV. 515, 542-43 (1970).

<sup>66</sup> See note 37 *supra*.

<sup>67</sup> Larson, *Workmen's Compensation Employer's Independent Action Against Third Party*, 27 WASH. & LEE L. REV. 223, 232 (1970).

<sup>68</sup> Liberty Mutual Ins. Co. v. United States, 290 F.2d 257 (2d Cir. 1961). This case arose under Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970).

<sup>69</sup> Murray v. Dewar, 6 Wis. 2d 411, 94 N.W.2d 635 (1959). See generally Larson, *supra* note 67, at 226-31.

<sup>70</sup> 394 U.S. 404 (1969). The case involved a suit under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970), by the widow of a stevedore who was killed when he fell into an unprotected tank on the respondent's vessel. The Supreme Court overturned the lower court's findings that the employer had breached its warranty to perform the work in "a safe, workmanlike and seamanlike manner," that this breach gave rise to a duty of indemnity by the employer, and that no duty of due care ran from the shipowner to the employer such as would allow a counter-claim for indemnity back.

<sup>71</sup> The Court stated:

Nothing on the face of § 33 of the Act purports to limit the employer's remedy against third persons to subrogation to the rights of the deceased employee's representative . . . .

. . . Neither this Court nor, before this case, any other court has held that statutory subrogation is the employer's exclusive remedy against third party wrongdoers and we decline to so hold today.

394 U.S. at 412-14. Although this case was decided under maritime law, the applicable statute here, the Longshoremen's and Harbor Worker's Compensation Act, also serves as the workmen's compensation act for the District of Columbia. D.C. CODE ANN. § 36-501 (1967).

<sup>72</sup> 33 U.S.C. §§ 901-950 (1970).

alleged duty to perform its services in a "safe, workmanlike and seamanlike manner."<sup>73</sup> The employer counterclaimed against the shipowner on the basis of a duty to provide a safe place for the stevedores to work.<sup>74</sup> Thus, although the action arose out of a desire by the parties to shift the burdens of payment that were imposed by the workmen's compensation statute, the factual situation is unlike anything likely to be encountered where a products liability claim would arise.<sup>75</sup> The district court<sup>76</sup> and the court of appeals<sup>77</sup> disallowed the action by the employer to pass the workmen's compensation costs to the shipowner on the basis of a duty to provide a safe place of employment, holding that the right of subrogation to the wrongful death action that the Longshoremen's and Harbor Workers' Compensation Act provides constituted the employer's sole remedy. The Supreme Court reversed that holding, stating that "the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect."<sup>78</sup> By allowing a cause of action for the shifting of workmen's compensation costs to be based on a right existing outside of the statute itself, the Court provided a means for a greater degree of interplay of claims and counterclaims between the third party and the employer. This would be especially valuable to workmen's compensation carriers in cases like *Burnside* where the potential statutory liability of the employer exceeds that of the third party.<sup>79</sup>

Although the result in *Burnside* may have resulted in the full financial burden of the accident being placed upon one party, the decision should not be construed as opposing the view that there should be some sort of apportionment between the parties who are jointly liable to the injured worker. Considering the existence of the shipowner's indemnity claim, the case may well exemplify a feeling by the Court that the costs of enterprise should be able to be distributed as freely as possible.<sup>80</sup>

The courts of the two states which do not provide statutory

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<sup>73</sup> 394 U.S. at 409.

<sup>74</sup> *Id.*

<sup>75</sup> See note 35 *supra*, in which it is pointed out that it would be unusual for the employer to warrant the safety of his actions to the third party in the manufacturer-employer situation.

<sup>76</sup> 284 F. Supp. 740 (E.D. Ill. 1967).

<sup>77</sup> 392 F.2d 918 (7th Cir. 1968).

<sup>78</sup> 394 U.S. at 412.

<sup>79</sup> The employer's liability could have amounted to as much as \$70,000, but the Illinois Wrongful Death Act, ILL. REV. STAT. ch. 70, § 2 (Supp. 1970), placed a ceiling on the widow's recovery, and thus the employer's subrogation rights, at \$30,000.

<sup>80</sup> See 2 LARSON, *supra* note 7, § 76.22, at 250.9.

subrogation for the employer<sup>81</sup> have generally denied recovery by the employer on the ground that an equitable remedy such as subrogation will not be made available to a negligent party.<sup>82</sup> Since the obligations of the two parties to the injured workman are based on different rights and are intended to compensate for different losses, these courts have held that no undue benefit has been conferred upon the third party by the employer's payment of workmen's compensation benefits.<sup>83</sup> Because each party has discharged only his own independent liability, there has been no unjust enrichment of the third-party manufacturer. In finding that restitution should not be allowed to the employer, one court has reasoned:

[A]n employer making payment under the [workmen's compensation act] fulfills only his own contractual obligation; he does not in any way satisfy the third party tort-feasor's liability to the employee . . . . The liability of the third-party tort-feasor to the employee still exists . . . notwithstanding the fact that the employee has made a recovery from the Fund.

. . . .

" . . . [I]f the loss insured against is not the same loss for which plaintiff [the employee] had a right of action against the wrong-doer, the defendant [the employer] had no right of subrogation to such claims."<sup>84</sup>

Among those jurisdictions allowing subrogation by statute, a respectable minority has undertaken to apportion the loss be-

<sup>81</sup> See note 36 and accompanying text *supra*. For a period of time during 1952 and 1953, Illinois had no right of subrogation when a portion of its workmen's compensation statute was held unconstitutional, but common-law subrogation was allowed in the case of Geneva Constr. Co. v. Martin Transfer and Storage Co., 4 Ill. 2d 273, 122 N.E.2d 540 (1954).

<sup>82</sup> See generally Note, *Workmen's Compensation: Should A Contributorily Negligent Employer Be Subrogated?*, 42 IND. L.J. 430, 434 (1967); H. McCLINTOCK, *THE PRINCIPLES OF EQUITY* § 123 (1948).

<sup>83</sup> *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277 (4th Cir. 1940), held that where an employee was struck by a coal car being pushed by an engine of the defendant, he was entitled to retain both the workmen's compensation award and the tort recovery from the railroad. The employer's attempt to recoup the \$4,000 paid or the \$11,000 in increased rates resulting from the accident was not allowed. In *Fischer Construction Co. v. Stroud*, 175 Ohio St. 31, 34, 191 N.E.2d 164, 166 (1963), the employer's suit to recover \$27,515 in increased insurance rates out of the employee's third-party recovery was denied, the court saying that

[A]n employer cannot recover from any source any sum to reimburse him for an increased amount paid as a premium under the Workmen's Compensation Act due to the death of an employee, although such death was caused by the act of a third party.

See also, Hardman, *The Common-Law Right of Subrogation Under Workmen's Compensation Acts*, 26 W. VA. L.Q. 183 (1920).

<sup>84</sup> *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277, 280-81 (4th Cir. 1940) (citation omitted).



tween the employer and the third party by means of contribution. Although the bases for the decisions and the means effectuating cross-payments differ among the jurisdictions, Pennsylvania, California, North Carolina, and South Carolina grant the third party relief from the negligent employer's attempt at subrogation<sup>85</sup> and in this manner prevent the employer from passing on his total liability under the terms of the workmen's compensation statutes.

Courts in California, North Carolina, and South Carolina have allowed the third party to defeat the claim of a negligent employer for reimbursement and allowed a set off against the tort recovery in the amount of the workmen's compensation award.<sup>86</sup> The result of this procedure, predicated in part upon the legislature's enactment of provisions allowing contribution among joint tortfeasors,<sup>87</sup> retained the deterrent and risk-spreading benefits of the workmen's compensation acts while guaranteeing the fixed liability ceiling of the employer.<sup>88</sup> The Pennsylvania Supreme Court allowed contribution between the negligent employer and the third party<sup>89</sup> on the basis of what was held to be the legislature's intent in enacting a joint tortfeasors statute.<sup>90</sup> The court held that since

<sup>85</sup> See 2 LARSON, *supra* note 7, § 76.22, at 250.2.

<sup>86</sup> *Witt v. Jackson*, 57 Cal. 2d 57, 17 Cal. Rptr. 369, 366 P.2d 641 (1961); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953); *American Casualty Co. of Reading, Pa. v. South Carolina Gas Co.*, 124 F. Supp. 30 (W.D.S.C. 1954); *Essick v. City of Lexington*, 233 N.C. 600, 65 S.E.2d 220 (1951), in which the court allowed the third party to plead the contributory negligence of the employer as a defense to a suit for reimbursement of the workmen's compensation costs.

<sup>87</sup> CAL. CIV. PRO. CODE §§875-880 (West Supp. 1972); N.C. GEN. STAT. § 1B-1 (1969).

<sup>88</sup> *Witt v. Jackson*, 57 Cal. 2d 57, 72, 17 Cal. Rptr. 369, 377, 366 P.2d 641, 649, (1961); *Lovett v. Lloyd*, 236 N.C. 663, 669-70, 73 S.E.2d 886, 891-92 (1953). Note the discussion of this point in *Baccile v. Halcyon Lines*, 187 F.2d 403, 406 (3d Cir. 1951), *rev'd*, 342 U.S. 282 (1952), an admiralty case in which the jury verdict charging the employer with 75 percent of the costs of the accident was lowered by the district court to 50 percent under the moiety principle of admiralty law. The court of appeals then reduced the award to the amount of the workmen's compensation award. 187 F.2d at 406. The Supreme Court ultimately denied all recovery, placing the entire cost on the third party. 342 U.S. at 287.

<sup>89</sup> See *Maio v. Fahs*, 339 Pa. 180, 14 A.2d 105 (1940). The Pennsylvania Supreme Court, per Justice Roberts, stated in *Elston v. Industrial Lift Truck Co.*, 420 Pa. 97, 102 n.2, 216 A.2d 318, 320 n.2 (1966):

Implicit in these [prior Pennsylvania] holdings is the view that the definition of "joint-tortfeasors" does not require that they have a common liability toward the injured party but only that their combined conduct be the cause of the injury.

Compare this statement with the language of PA. STAT. ANN. tit. 12, § 2082 (1967), which specifies that "the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to persons or property." (emphasis added).

<sup>90</sup> The earlier statutes upon which the Pennsylvania cases were based has since evolved into the UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT, PA. STAT. ANN. tit. 12, §§ 2082-89 (1967). For an example of the cases disputing this interpretation of these acts, see *Baltimore Transit Co. v. State*, 183 Md. 647, 682, 39 A.2d 858, 862 (1944), where the court said that the difficulties posed by an action for indemnity under both the

both parties were concurrently negligent, if not jointly liable, the statutory contribution should be imposed, although it would otherwise have been prohibited by the terms of the workmen's compensation act.<sup>91</sup> By limiting the amount of contribution to the extent of the employer's liability under the workmen's compensation act,<sup>92</sup> the social policies underlying both enactments were retained while preserving both the full extent of the injured party's recovery and the employer's limited liability.<sup>93</sup>

*Murray v. United States*<sup>94</sup> demonstrates another alternative for eliminating the inequitable burdens imposed by the statutory liability of the employer and the tort liability of the third party. In *Murray* a federal court of appeals indicated that an employee's acceptance of workmen's compensation benefits from his employer could exhaust half of his total cause of action; consequently, any recovery against the third party who was separately liable should be diminished by one-half.<sup>95</sup> Professor Larson indicates, however, that the decision is of dubious precedential value and provides a result that is "clearly unacceptable . . .,"<sup>96</sup> by apportioning the cost of the injury between the culpable parties at the expense of the injured party.<sup>97</sup>

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workmen's compensation and contribution acts "cannot be resolved under existing Maryland Statutes; the matter is one for legislative consideration."

<sup>91</sup> See 2 LARSON, *supra* note 7, § 76.22, at 250.2 for a description of the mechanics of the application of the Pennsylvania rule vis-à-vis the North Carolina and California rule.

<sup>92</sup> In *Brown v. Dickey*, 397 Pa. 454, 459, 155 A.2d 836, 839 (1959), the court held that the liability of an employer who was found by the jury to have been "equally negligent" was limited to the amount of the workmen's compensation award, stating that "the appellant's equitable right, bolstered by the Uniform Act must bow to the statutory right of the employer-appellee to be free from common law liability." Professor Larson criticizes this as an arbitrary limitation. Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351, 364 (1970).

<sup>93</sup> Larson hypothesizes that were a court free to start with a "clean slate," the Pennsylvania rule for contribution "would probably be the fairest available compromise in light of all the conflicting policy interests." 2 LARSON, *supra* note 7, at 363. Professor Riesenfeld, retaining the metaphor in *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets*, 53 CAL. L. REV. 207, 217 (1965), seems to reject the suggestion that recovery-over, limited by the amount of the compensation award, is "the most equitable distribution," by writing that

A system which leads to an equitable division of the *whole* loss, according to the degree of culpability of the parties might ultimately be a fairer solution [although] such an apportionment would produce considerable practical difficulties in its administration.

<sup>94</sup> 405 F.2d 1361 (D.C. Cir. 1968).

<sup>95</sup> Rather than being based upon a law authorizing contribution among joint tortfeasors, as have been most attempts to mitigate the burden of the third party, the *Murray* decision seems to rely upon the single cause of action theory common to subrogation in this area (see note 37 *supra*) and a rule dealing with compensation and covenants not to sue. *Id.* at 1365. See Note, *Settlement with One Joint Tortfeasor Bars Recovery Against Others of the Settling Tortfeasor's Proportionate Share of Damages*, 19 SW. L.J. 650 (1965).

<sup>96</sup> 2 LARSON, *supra* note 7, § 76.22, at 250.8.

<sup>97</sup> If an injured employee has recovered \$10,000 in workmen's compensation benefits from his employer and receives a judgment of \$50,000 in tort from the third party, he

Although such decisions clearly represent the minority view, the extremism of the *Murray* decision and the relatively recent attempt by a federal court in Rhode Island to adopt the Pennsylvania rule<sup>98</sup> constitute "strong evidence that some device ought to be found to arrive at a compromise of the interests of employer and third party in this class of cases."<sup>99</sup>

### C. Legislative Action

The problems involved in a just apportionment of the cost of the damages necessarily entailed in the course of carrying on an enterprise arise from the fact that third-party actions between joint tortfeasors were simply not contemplated by the drafters of the workmen's compensation laws.<sup>100</sup> The bar to actions against the employer was intended as a quid pro quo for the absolute liability of the employer,<sup>101</sup> and was probably never thought of as having application to the third-party situation, let alone the situ-

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would be held to forfeit \$25,000 of the \$50,000 since one-half of his total cause of action was directed against the employer from whom he has already recovered. Thus, under the *Murray* rule the employee would be awarded a total of \$35,000 as opposed to the \$50,000 he would have recovered under either the majority rule or the rules followed in California, North Carolina, and Pennsylvania. In Ohio and West Virginia, where equitable subrogation would be denied the employer, the injured worker would recover a total of \$60,000. Note that the effect of the *Murray* decision would approximate the result in the earlier workmen's compensation statutes where the worker was required to elect to apply his cause of action to either the employer or the third party. The election requirements have been generally discredited and eliminated from the statutes, however, because of their undermining of the basic rationale of the laws. See 2 LARSON, *supra* note 7, § 73, at 226.64-.78; Behrendt, *The Rationale of the Election of Remedies Under Workmen's Compensation Acts*, 12 U. CHI. L. REV. 231 (1945); James *Social Insurance and Tort Liability*, *supra* note 51, at 543.

<sup>98</sup> *Newport Air Park, Inc. v. United States*, 293 F. Supp. 809 (D.R.I. 1968), *rev'd*, 419 F.2d 342, 345 (1st Cir. 1969), the adoption of the Pennsylvania rule being seen as "impermissible ad hoc legislation." The district court had sought to adopt the Pennsylvania rule on the grounds that

(1) it preserves the economics of the compensation system; (2) it effectuates the policy of contribution which the passage of the uniform law [R.I. Gen. Laws Ann. § 10-6-2] suggests; (3) it harmonizes the compensation law with the law of contribution; and (4) it protects the nonemployer tortfeasor from the possible gross inequity of carrying the whole liability for wrongs caused in perhaps major part by the employer tortfeasor.

293 F. Supp. at 815. See also *Rowe v. John C. Motter Printing Press Co.*, 273 F. Supp. 363 (D.R.I. 1967), where Judge Day decided that under Rhode Island's contribution statute no recovery could be allowed against the employer.

<sup>99</sup> 2 LARSON, *supra* note 7, § 76.22, at 250.8-.9.

<sup>100</sup> Regarding the enactment of the Federal Employee's Compensation Act, 5 U.S.C. §§ 8101 *et seq.* (1970), the Supreme Court stated in *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 601 (1963), that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties . . ." when the act was considered. See S. REP. NO. 836, 81st Cong., 1st Sess. 23 (1949); 1949 U.S. CODE CONG. SERVICE 212; 2 LARSON, *supra* note 7, § 76.53, at 250.87.

<sup>101</sup> See, e.g., *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 413 (1969).

ation where it is a negligent employer that is attempting to sue the third party.<sup>102</sup> The early decisions involving the negligent employer may have been thought justified, in spite of the inapplicability of the statutes, by a belief that the third party's negligence foreclosed him from complaining about unfair treatment. However, in the products liability area, where strict liability does not necessarily imply the presence of negligence, this rationale also fails. It is for these reasons that the majority rule has achieved less than equitable results.<sup>103</sup>

Courts which have sought to effect a compromise by placing a share of the burden of the recovery on the employer have generally been forced to analogize to laws and systems more consistent with notions of sharing liability among those at fault. Thus some courts have relied upon statutes permitting contribution between joint tortfeasors in derogation of the common-law rule as evidence of the direction in which the legislatures would most likely have gone had they considered the problem in the context of workmen's compensation.<sup>104</sup> Similarly, the *Murray* court considered the problem as closely analogous to a covenant not to sue a joint tortfeasor following the settlement of the claim against him.<sup>105</sup> The principal case denying subrogation in those states that do not have statutory subrogation relies in large part upon a discussion of the subrogation and indemnification rights existing under an accident or life insurance contract.<sup>106</sup>

If the courts continue to look toward collateral legislative activity for guidelines in their determinations of the problems created by the lack of an explicit workmen's compensation law, they may very well turn to the recently enacted Occupational Safety and Health Act of 1970 (Act).<sup>107</sup> The enactment of this measure may indicate a desire on the part of Congress to place an increased emphasis on the deterrence of industrial accidents in the place of employment.<sup>108</sup> Although the Act disavows any effect on the tort

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<sup>102</sup> See note 100 *supra*.

<sup>103</sup> See notes 53-65 and accompanying text *supra*.

<sup>104</sup> See notes 86-93 and accompanying text *supra*.

<sup>105</sup> See notes 94-95 and accompanying text *supra*.

<sup>106</sup> *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277, 281 (4th Cir. 1940).

<sup>107</sup> 29 U.S.C. §§ 651-678 (1970).

<sup>108</sup> The language of the Act in § 1 states that

The Congress declares it to be its purpose and policy . . . to assure so far as possible every man and woman in the Nation safe and healthful working conditions . . . (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions.

29 U.S.C. § 651(b) (1970).

liability of the employer,<sup>109</sup> it does renew the obligation of the employer to furnish his employees with "employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees."<sup>110</sup>

A further provision of the Act creates a Workmen's Compensation Commission to study and evaluate different aspects of the various state workmen's compensation systems.<sup>111</sup> Regrettably, the problem of allocating among joint tortfeasors the burden of recovery for injury is not one of the enumerated topics for study by the Commission.<sup>112</sup> Nonetheless the Commission may give some attention to the issues of the statutory bar to tort liability and the express right of subrogation which arise after the

<sup>109</sup> *Id.* § 653(b)(4).

<sup>110</sup> *Id.* § 654(a)(1). This provision is similar in scope to § 1(e) of the Walsh-Healy Act, 41 U.S.C. § 35(e) (1970), which has required that material furnished under government contracts shall not be

manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees . . . .

<sup>111</sup> The purpose of the Workmen's Compensation Commission is to make an effective study and objective evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment.

29 U.S.C. § 676(a)(2) (1970).

<sup>112</sup> The topics for study and evaluation by the Commission include, but are not limited to:

(A) the amount and duration of permanent and temporary disability benefits and the criteria for determining the maximum limitations thereon, (B) the amount and duration of medical benefits and provisions insuring adequate medical care and free choice of physician, (C) the extent of coverage of workers, including exemptions based on numbers or type of employment, (D) standards for determining which injuries or diseases should be deemed compensable, (E) rehabilitation, (F) coverage under second or subsequent injury funds, (G) time limits on filing claims, (H) waiting periods, (I) compulsory or elective coverage, (J) administration, (K) legal expenses, (L) the feasibility and desirability of a uniform system of reporting information concerning job-related injuries and diseases and the operation of workmen's compensation laws, (M) the resolution of conflict of laws . . . , (N) the extent to which private insurance carriers are excluded from supplying workmen's compensation coverage and the desirability of such exclusionary practices, to the extent they are found to exist, (O) the relationship between workmen's compensation on the one hand, and old-age, disability, and survivors insurance and other types of insurance, public or private, on the other hand, (P) methods of implementing the recommendations of the Commission.

*Id.* § 676(d)(1).

The Commission submitted its report on July 31, 1972. The report does not mention the problem of subrogation but does recommend the creation of a federal workmen's compensation commission, the duties of which would include the analysis of areas which the current commission could not examine adequately. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 126 (1972).

injured party has recovered. Judges<sup>113</sup> and writers<sup>114</sup> who have sensed that courts are not able to make decisions based upon a statute that is inappropriate for this multiparty situation have called for legislative reform. It is clearly time for a body such as this Commission to study the full effects of those devices designed to guard the rights of an employer which have been utilized to shift the cost of liability.<sup>115</sup> The culmination of any comprehensive study should be recommended statutory reform.

It is inappropriate to use the relative fault of the parties to justify subrogation where the employer is blameless. Conversely, it is equally inappropriate to ignore the concept of relative fault on the basis of laws that were not meant to apply to the situation where the employer is negligent but the third party is not. In a branch of the law predicated upon liability without fault, it is essential that the degree to which fault is to be considered in the apportionment of any recovery between two enterprises be consistent with the social goals that such a system hopes to attain.<sup>116</sup> The basic rationales advanced for both workmen's compensation and strict liability are that these are means by which redress might be efficiently made for injuries incurred as the inevitable result of conducting a business, at a minimal cost to any one party, and with the highest potential for deterrence. Any revision of the workmen's compensation laws would have to emphasize these justifications in order to resolve the problem of equitable apportionment. Operation consistent with the theories underlying enterprise liability is a goal that must be attained even at the cost of denying automatic statutory subrogation to the employer or of eliminating foreclosure of the third party's claim.

A revision would logically extend to the situation where the employer does not share with the third-party manufacturer any

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<sup>113</sup> The Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1952) stated that "legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups." This case involved the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970), which provides that

The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages . . . on account of such injury or death.

*Id.* at § 905. See also *Baltimore Transit Co. v. State*, 183 Md. 674, 682, 39 A.2d 858, 862 (1944).

<sup>114</sup> 2 LARSON, *supra* note 7, § 76.22, at 250.9, and § 76.53, at 250.87; Note, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts*, 42 VA. L. REV. 959, 976 (1956); McCoid, *supra* note 5, at 445.

<sup>115</sup> See note 59 and accompanying text *supra*.

<sup>116</sup> See notes 18-20 and accompanying text *supra*.

blame for the accident. Nearly all authorities believe that in this case the employer should be allowed to recoup the cost of the workmen's compensation award in a suit against the third party.<sup>117</sup> However, an analysis of the liability of the parties from the standpoint of social insurance reveals no real difference from the case in which they share the fault. The manufacturer is strictly liable in tort, and the employer is liable under the workmen's compensation statute. The policies behind the increased level of liability to both of these enterprises are unchanged, for these policies spread the cost of doing business as thinly as possible and maintain a deterrent effect on the industries.

A plausible explanation for the near unanimity of result where the employer shares no culpability for the injury is that the legislatures, in compromising the basic precepts of statutory liability by allowing equitable subrogation, have adhered to the common-law belief that the burden of making the victim whole should be put onto the wrongdoer whenever possible.<sup>118</sup> This compromise undermines the benefits of the enterprise liability system to a considerable extent. While this combination of liability and subrogation does not deny the injured party his right to a swift and efficient recovery, which is the prime concern of any form of social insurance, it does have the adverse effect of allowing the employer to receive a windfall by the presence of a third party. There is no justification for avoiding the statutory liability present in the theory of workmen's compensation except by reference to the common-law concepts of fault made inapplicable to the employer when he became subject to the statutory liability.<sup>119</sup> Allowing the employer to enter into the suit and attempt to shift his costs by means of subrogation, Professor James says,

tends to be wasteful in a society whose judicial machinery is

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<sup>117</sup> See, e.g., 2 LARSON, *supra* note 7, § 74.31, at 226.105-.118. Professor James seems to be the only dissenter, arguing that once the injured party has recovered from both the employer and the third party

the interest of society will generally be served best by leaving matters as they are at this point. Some of the objectives of the law have certainly been achieved. The injured person has already been compensated, and at least a portion of his loss shifted to a party who has or will distribute it widely according to insurance principles and is peculiarly well equipped to perform that function. To this extent a condition of equilibrium has been reached. Any further shifting of loss will disturb it . . .

James, *Social Insurance and Tort Liability*, *supra* note 51, at 557.

<sup>118</sup> See note 60 *supra*.

<sup>119</sup> Certainly the employer is obligated to provide workmen's compensation payments in those cases where the employer is not at fault but no third party is involved. This is the essence of the workmen's compensation system: a swift and assured recovery for all accidents in exchange for a limitation of the amount of the employer's liability. See note 17 *supra*.

already overtaxed. It is often allowed in situations where it simply takes money from one of a man's pockets and puts it in one of his other's [sic], or where cross-claims for subrogation will occur frequently and cancel out. It sometimes takes a loss out of machinery for distributing it and throws it back onto an individual who cannot distribute losses at all. It probably accomplishes little of the admonitory function. It is an inappropriate weapon for punishment.<sup>120</sup>

A system of absolute liability that can only be applied to modern enterprise by analogy to the common law is, to a large extent, self-defeating. The efforts of the courts to interpret inapplicable laws have resulted in a lessening of the benefits intended to be provided.<sup>121</sup> The cases indicate unneeded complexity and a considerable degree of inequity as a result of indiscriminate doses of what is meant to be common-law justice.<sup>122</sup> In the third-party action, either where the employer is concurrently responsible for the injury or where he is not at fault, a more satisfactory result would be reached if the law were to reject any concern with fault on the part of the employer and concentrate on his statutory liability. A purer system of enterprise liability would be better able to fulfill the needs of the employer, the third party, and society as a whole, without sacrificing any benefit to the injured workman.

#### IV. CONCLUSION

Professor Ehrenzweig laments the fact that "the 'common sense of an industrial society' had to make its way within the law of negligence 'against minds steeped in the absolutes of a once common law.'"<sup>123</sup> There can be no doubt that this is precisely the problem existing in the situation that has been discussed. In the absence of adequate statutory guidance the courts have been forced to fill the gaps in the development of enterprise liability by analogy to portions of the common law which have become inappropriate. Legislative action is clearly required to provide a firm basis for this area of injury law. Any proposed measure should attempt to be totally consonant with the ideals of modern enterprise liability, rather than loosely and indiscriminately tied to principles of fault that have been rejected in the industrial setting.

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<sup>120</sup> James, *Social Insurance and Tort Liability*, *supra* note 51, at 563.

<sup>121</sup> See notes 58-64 and accompanying text *supra*.

<sup>122</sup> See notes 58-60 and accompanying text *supra*.

<sup>123</sup> EHRENZWEIG, *supra* note 6, § 16, at 55.



The need is for action that would necessitate a reevaluation of the requirements of society and the positions of the parties in an attempt to reach a solution whereby the cost of injuries suffered in the course of employment is placed upon those who are most able to bear the burden in an efficient and equitable manner.

—*John A. Payne, Jr.*